

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOHN SIMMONS,

Plaintiff,

vs.

MORGAN STANLEY SMITH  
BARNEY, LLC,

Defendant.

Case No. 11cv2889-WQH (MDD)

ORDER ON JOINT MOTION  
FOR DETERMINATION OF  
DISCOVERY DISPUTE:  
GRANTING IN PART AND  
DENYING IN PART  
DEFENDANT'S MOTION TO  
COMPEL PRODUCTION OF  
PLAINTIFF'S INVESTIGATOR'S  
REPORTS

[ECF NO. 58]

Before the Court is the joint motion of the parties to determine a discovery dispute. The motion was filed February 25, 2013, and is predicated upon Defendant's belief that Plaintiff must produce reports of witness interviews prepared by his investigator. (ECF No. 58). Plaintiff asserts that his investigator's reports are protected from disclosure as work-product. Defendant claims that any such protection has been waived. (*See id.*) The Court held a hearing on the motion on March 5, 2013. For the following reasons, the motion is **GRANTED IN PART AND DENIED IN PART**.

## Background

2 For a detailed exposition of the background facts of this litigation,  
3 see the Order issued by the Hon. William Q. Hayes on May 24, 2012,  
4 granting in part and denying in part Defendant's motion to compel  
5 arbitration. (ECF No. 37). As a consequence of that Order, the only  
6 claims pending before the Court at this time are Plaintiff's claims for  
7 employment discrimination in violation of 42 U.S.C. § 2000e and  
8 Cal.Govt.Code § 12940(a). Plaintiff asserts that he was discriminated  
9 against by Defendant in his employment based upon his membership in  
10 the Church of Jesus Christ of Latter Day Saints.

## Legal Standard

12 The Federal Rules of Civil Procedure generally allow for broad  
13 discovery, authorizing parties to obtain discovery regarding “any  
14 nonprivileged matter that is relevant to any party’s claim or defense.”  
15 Fed.R.Civ.P. 26(b)(1). Ordinarily, however, “a party may not discover  
16 documents . . . that are prepared in anticipation of litigation or for trial  
17 by or for another party or its representative.” Fed.R.Civ.P. 26(b)(3).

18        The work product doctrine does not protect facts from discovery.  
19        “[B]ecause the work product doctrine is intended only to guard against  
20        the divulging of attorney’s strategies and legal impressions, it does not  
21        protect facts concerning the creation of work product or *facts contained*  
22        *within the work product.*” *Garcia v. City of El Centro*, 214 F.R.D. 587,  
23        591 (S.D. Cal. 2003)(citations omitted). “Only when a party seeking  
24        discovery attempts to ascertain facts, ‘*which inherently reveal the*  
25        *attorney’s mental impression,*’ does the work product protection extend to  
26        the underlying facts.” *Id.* Consequently, the identity of witnesses  
27        interviewed can reveal “which witnesses counsel considers important,  
28        revealing mental impressions and trial strategy.” *Plumbers &*

1 *Pipefitters Local 572 Pension Fund v. Cisco Systems, Inc.*, 2005 U.S. Dist.  
2 LEXIS 43648, \*16 (N.D. Cal. 2005), quoting *In re MTI Tech. Corp. Sec.*  
3 *Litig. II*, 2002 U.S. Dist. LEXIS 13015, \*8 (C.D. Cal. 2002); *Gen-Probe v.*  
4 *Becton, Dickinson & Co.*, 2011 U.S. Dist. LEXIS 27961, \*7 (S.D. Cal.  
5 2011) (Stormes, J.) (denying request to produce supplemental contact  
6 information for witnesses because it “would transform the information  
7 from the type where the identity of witnesses interviewed is not  
8 disclosed into the type where such disclosure can be inferred”); *In re*  
9 *Ashworth, Inc. Securities Litigation*, 213 F.R.D. 385 (S.D. Cal. 2002)  
10 (work product privilege protected information as to whether investigator  
11 had interviewed a particular witness).

12 Discussion

13 This dispute initially arose as a consequence of another discovery  
14 dispute. On January 11, 2013, Defendant moved to quash a deposition  
15 subpoena served by Plaintiff upon David Fields. (ECF No. 51). In  
16 connection with his response, Plaintiff submitted the declaration of  
17 Arnold Botts, an investigator employed by Plaintiff’s attorneys in  
18 connection with this case. (ECF No. 56-2). In his declaration, Mr. Botts  
19 relayed the substance of an interview he conducted with Mr. Fields to  
20 support Plaintiff’s claim that Mr. Fields could provide relevant  
21 testimony. The same declaration also contains a single three-sentence  
22 paragraph reporting information attributed to other, unnamed  
23 witnesses. Apart from the declaration, statements allegedly made to  
24 Mr. Botts by another witness, Susan Dixon, were used by Plaintiff in  
25 cross-examining her.

26 Defendant asserts that any work-product protection that attended  
27 to any witness reports prepared by Mr. Botts in connection with this case  
28 has been waived. Plaintiff disagrees but has offered to produce the

1 reports of Mr. Botts' interviews with Mr. Fields and Ms. Dixon.

2 Work product protection is waived with respect to matters used in  
 3 testimony. *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010),  
 4 citing *United States v. Nobles*, 422 U.S. 225, 239-240 (1975). The Botts  
 5 declaration was filed by Plaintiff in response to a motion to quash  
 6 brought on behalf of Mr. Fields. Plaintiff argues that this disclosure was  
 7 compelled when Defendant sought to quash the deposition subpoena for  
 8 Mr. Fields. Plaintiff contends this limited disclosure, for the purpose of  
 9 opposing a motion, should not be used as a basis for waiver. On the  
 10 other hand, as noted by the Court in its ruling on the Fields dispute, the  
 11 Fields dispute may have been prompted by Plaintiff's counsel. (See ECF  
 12 No. 57 at 4-5). Plaintiff's counsel, at the hearing on this motion,  
 13 reiterated his offer to produce the report of Mr. Botts regarding his  
 14 interview of Mr. Fields to Defendant. The Court finds that production of  
 15 that report is justified and **ORDERS** Plaintiff to produce the report of  
 16 Mr. Botts' interview with Mr. Fields.

17 The issue regarding using statements allegedly made to Mr. Botts  
 18 to cross-examine Ms. Dixon poses a thornier issue regarding whether the  
 19 use of those statements is "testimonial." As Plaintiff generously has  
 20 offered to produce the report of Mr. Botts' interview of Ms. Dixon, the  
 21 Court will not reach that issue but endorses the decision to produce the  
 22 report.

23 In paragraph 8 of his declaration submitted in connection with the  
 24 Fields dispute, Mr. Botts said:

25 Other witnesses I have interviewed have indicated that Mr.  
 26 Simmons uniformly refused to drink alcoholic beverages; as such  
 27 use is violative [sic] of a basic tenant [sic] of his Mormon religion. I  
 28 have also learned that his abstinence was a constant source of  
 tension with Mr. Kentfield, his direct supervisor. I have also  
 learned that Mr. Kentfield made disparaging comments directly to  
 Mr. Simmons about his religion.

1 (ECF. No. 56-2). Defendant asserts that any reports of Mr. Botts'  
2 interviews with these unnamed witnesses is now subject to disclosure.

3       The Botts declaration, which was relied upon by the Court in ruling  
4 upon the Fields dispute contained three paragraphs reporting statements  
5 allegedly made to Mr. Botts by Mr. Fields. (*Id.* at ¶¶ 5-7). Paragraph 8,  
6 by contrast, appears to have been included to provide some corroboration  
7 for statements allegedly made by Mr. Fields. The Court is loathe to find  
8 that work product protection is completely waived based upon these  
9 conclusory statements which were of negligible value in deciding the  
10 motion.

11       As to the first sentence, the Court finds that whether or not  
12 witnesses believe that Plaintiff does or does not consume alcohol is not  
13 relevant. The identity of those witnesses and their statements need not  
14 be disclosed. Sentence two reports that Mr. Botts “learned” that  
15 Plaintiff’s abstinence was a source of tension between him and his  
16 supervisor. It may be relevant to Plaintiff’s claim of religious  
17 discrimination that his religion-based abstinence was a source of friction  
18 with his supervisor. In sentence three, Mr. Botts reported that he  
19 “learned” that Mr. Kentfield made disparaging comments directly to  
20 Plaintiff about his religion.

21       The Court finds that Mr. Botts’ statements in sentences two and  
22 three of paragraph 8 are testimonial and may qualify as a limited waiver.  
23 Rather than require the production of the identity or statements of these  
24 witnesses, which is more invasive than the Court believes necessary  
25 under the circumstances, the Court instead **ORDERS** that Plaintiff is  
26 **PRECLUDED** from presenting any testimony from any witness relied  
27 upon by Mr. Botts in sentences two and three unless the witness has  
28 been disclosed in conformance with Fed.R.Civ.P. Rule 26(a)(1)(A)(i).

1 To the extent that Defendant asserts that all protection has been  
2 waived for all of Mr. Botts' reports, the Court rejects that view and finds  
3 to the contrary.

## Conclusion

5 For the foregoing reasons, Defendant's motion to compel production  
6 of the reports of Mr. Botts is **GRANTED IN PART AND DENIED IN**  
7 **PART.** The reports of interviews by Mr. Botts of Mr. Fields and Ms.  
8 Dixon are to be produced to Defendant within ten days of the filing of this  
9 Order. To the extent that Plaintiff must amend his disclosures under  
10 Rule 26(a)(1)(A)(i), such amendments also must be made within ten days  
11 of the filing of this Order. *See* Rule 26(e)(1)(B).

IT IS SO ORDERED.

DATED: March 8, 2013

Mitchell D. Dembin  
Hon. Mitchell D. Dembin  
U.S. Magistrate Judge